Petition

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1981

ROY SUMNER and DOROTHY SUMNER,
Petitioners,

v.

CATHERINE S. SHEPPARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

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QUESTION PRESENTED

May maternal grandparents, under certain circumstances, be awarded custody of their minor grandchild in a divorce proceeding if such award is in the "best interests" of said minor grandchild or does the due process clause require that in all cases the "parental preference" doctrine be applied requiring that the natural parent be first found to be "unfit" to have custody.

PARTIES TO PROCEEDINGS

The parties to this case are:

Petitioners: Roy Sumner and Dorothy Sumner, who are the maternal grandparents of Patrick Sheppard, a minor child.

Respondent: Catherine S. Sheppard, who is the mother of Patrick Sheppard.

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Roy Sumner and Dorothy Sumner respectfully pray that a Writ of Certiorari issue to review the opinion of the Supreme Court of the State of Kansas.

OPINION BELOW

The opinion of the Kansas Supreme Court is reported as Sheppard v. Sheppard, 230 Kan. 146, 630 Pac.2d 1121. (See App. A)

JURISDICTION

The opinion of the Kansas Supreme Court was entered on July 17, 1981. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

UNITED STATES CONSTITUTION
AMENDMENT 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal

case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

UNITED STATES CONSTITUTION
AMENDMENT 14

Section 1. Citizens of the United States.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES INVOLVED

KANSAS STATUTES ANNOTATED

K.S.A. 1980 Supp. 60-1610(b)(2)

> "(2) At any time after custody of any minor child has been awarded pursuant to a divorce, annulment or separate maintenance decree, any person who has had actual physical custody of any such child after such decree was rendered with the consent of the parent having legal custody, where applicable, may request by motion to the court rendering such decree that legal custody of such child or children be awarded to such person. Notwithstanding the parental preference doctrine the court may award custody of any such child to such person if the best interests

of such child will be served thereby; and, if the court determines that a parental relationship has been established between such child or children and the moving party. No motion may be made pursuant to this subsection, unless the movant has had actual physical custody of the child or children within six (6) months from the date of the motion. In determining the best interest of the child, the court shall consider all relevant factors, including but not limited to the following: (A) The length of time that any such child has been under the actual care and control of any person other than a parent and the circumstances relating thereto; (B) the desires of the child's parents as to custody; (C) the desires

of the child as to the child's custodian; (B) the interaction and interrelationship of the child with parents, siblings, and any other person who may significantly affect the child's best interests; (E) the child's adjustment to such child's home, school, and community; and (F) the mental and physical health and age of all individuals involved."

STATEMENT OF THE CASE

Petitioners, Roy Sumner and Dorothy Sumner, are the maternal grandparents of Patrick Sheppard, a minor child eleven years of age. The Respondent, Catherine S. Sheppard, is the natural mother.

The Respondent has been twice divorced and in each divorce legal custody of Patrick Sheppard has been awarded to Respondent. However, Respondent has placed actual custody

of her son with the Petitioners. During most of his life, the Petitioners have cared for, supported, and housed the child. A parental relationship has developed between the minor child and his grandparents.

During the 1980 session of its legislature, the State of Kansas passed K.S.A. 1980 Supp. 60-1610(b)(2) (hereinbefore set forth). The new statute permitted, in certain circumstances, divorce courts to award legal custody of children of divorcing parents to other than the parents based on the "best interest of the child" doctrine. The statute thus changed Kansas common law which had adopted a very narrow "parental preference" doctrine which requires first a finding of unfitness of the parent.

In June, 1980, the Petitioners filed their motion with the District Court of Sedgwick County, Kansas, asking that they be awarded legal custody of Patrick under the

new statute. The said District Court, after extended testimony, granted the motion and awarded legal custody of Patrick to the Petitioners, his maternal grandparents. The Respondent contested the motion and raised the question of the constitutionality of the new statute. A copy of the District Court Journal Entry of September 4, 1980, is attached hereto as Appendix "B". The Journal Entry reflects that the said court held the new statute constitutional.

Thereafter, the Respondent perfected an appeal to the Supreme Court of Kansas, which, upon hearing reversed the lower court and found that K.S.A. 1980 Supp. 60-1610(b)(2) "is violative of the due process clause."

NOTE: This factual statement will be supplemented by reading the opinion of the Kansas Supreme Court which opinion is set out in full at Appendix "A".

REASONS FOR GRANTING THE WRIT (ARGUMENT)

1. THE DECISION OF THE KANSAS SUPREME COURT IS IN CONFLICT WITH THE DECISIONS OF SISTER STATES, THE BASIS OF WHICH IS THE INTERPRETATION OF THE UNITED STATES CONSTITUTION WHICH CONFLICT CAUSES CONFUSION AND MISTRUST OF THE LAW AMONG THE CITIZENS OF THE VARIOUS STATES OF THE UNION.

In child custody matters throughout the United States of America, two doctrines have emerged. The doctrines are (1) the "parental preference" doctrine and (2) the "best interest of the child" doctrine.

The "parental preference" doctrine holds that as between the minor child's parent and its grandparent the parent is entitled to custody where the parent has not abandoned the child and is not unfit to have custody of the child, and there are no other extraordinary circumstances requiring that the parent be deprived of custody.

"This rule is well exemplified by Blow v. Lottman (1953) 75 SD 127, 59 NW2d 825, a custody contest between the mother and the paternal grandmother of two girls, in which the trial court found that the mother had neglected her children to a considerable extent, that she was guilty of misconduct, that it would not be in the children's best interest to award custody to the mother, and that it would be in the children's best interest to award custody to the grandmother. In reversing a custody award to the grandmother, the court said that the mother's disqualification as custodian - by reason of gross misconduct, unfitness, or other extraordinary circumstances affecting the child's welfare - was a prerequisite to an award of custody to any other person; that the trial court's findings were insufficient as substitutes for a finding of the ultimate fact of the mother's unfitness; and that if the mother was a fit custodian, she could not be denied custody of her own children even if their grandmother was better qualified to rear them.

On the other hand, this rule was expressly rejected in Halstead v. Halstead (1966) 259 Iowa 526, 144 NW2d 861, wherein the court reversed a custody award to a child's mother, saying that in Iowa the child's best interest is the first and governing consideration in child custody cases and that Iowa rejects the view of some states - specifying Michigan, Nebraska, and New York - that in the absence of abandonment or parental unfitness, the custodial rights of natural parents control over all third parties.

Moreover, in People ex rel. Pace v. Wood (1964) 50 Ill. App.2d 63, 200 NE2d 125, the court said that it is not necessary to find a child's parent unfit in order to award custody of the child to a third person." 29 ALR3d 366 at page 392.

As can be seen from the above annotation the "best interests of the child" doctrine holds that the welfare of the child is the chief consideration or the "polar star" by which the court's discretion must be guided, and to which all other rules are secondary and, if in conflict, must give way and yield. 42 Am.Jur.2d, Infants, Section 43.

As can, also, be seen from the above annotation, some state courts have held that the welfare and best interests of the child are weightier considerations than its mother's right; Carrere v. Prunty (1965) 256 Iowa 525, 133 NW2d 692; even where the mother has in no way been found to be an unfit person to have custody; Payne v. Payne (1928) 218 Ala. 300, 118 So. 575, or even where she has specifi-

cally be found fit and suited to have custody; McBrien v. Zacha (1961) Tex.Civ.App. 351 SW2d 101.

The Supreme Court of the State of Kansas by its ruling in this case has indicated that under no circumstances does the due process clause allow the best interest of the child to be a paramount consideration when a grandparent seeks custody as against a neglectful parent.

In passing K.S.A. 60-1610(b)(2), the Kansas legislature set forth lengthy criteria and conditions under which Kansas courts could be guided in determining "best interests". The statute makes no attempt to entirely do away with the "parental preference" doctrine under all circumstances. In fact, the statute is quite limited in this application.

While the due process clause is wide in its protection of parental rights as in Stanley v. Illinois, 405 U.S. 645, 31 L.Ed.2d 511, 92 S.Ct. 1208 (1972), where the court declared

an Illinois statute violative of the due process clause because the statute didn't make any provisions for a fitness hearing for a father of an illegitimate child, the due process clause does not represent an inflexible mandate regarding fitness of parents under all circumstances as can be seen in Quilloin v. Walcott, 434 U.S. 246, 54 L.Ed.2d 511, 98 S.Ct. 549, Reh. denied 435 U.S. 918, 55 L.Ed.2d 511, 98 S.Ct. 1477 (1978), where the court held under these circumstances the father's consent to the adoption there was not required.

Indeed, divorce custody matters are quite different from adoption matters in many ways and divorce custody matters differ from one another. This is why Petitioners believe that K.S.A. 60-1610(b)(2) is not violative of the due process clause because the statute is quite limited in its application and contains sufficient criteria as stated by Justice McFarland of the Kansas Supreme Court in her

dissenting opinion. (See Appendix A). This statute does nothing more than recognize and make provision for the preservation of the family unit just as this court did in the Quilloin case.

CONCLUSION

For these reasons, and because sister states are making conflicting decisions on these questions, a writ of certiorari should issue to review the opinion of the Supreme Court of the State of Kansas, so that the court may set forth a more definitive decision to guide our lower courts.

Respectfully submitted,

ARNOLD M. MIZE
Attorney for Petitioners

October 10, 1981

APPENDIX A

IN THE
SUPREME COURT OF THE STATE OF KANSAS

No. 52,582

CATHERINE S. SHEPPARD,
Appellant,

v.

STEVEN H. SHEPPARD,
Appellee.

- - -

ROY SUMNER AND DOROTHY SUMNER,
Intervenors and Appellees.

(SYLLABUS OMITTED)

The opinion of the court was delivered by

MILLER, J.: This appeal is from the trial court's resolution of a child custody dispute arising from a post-divorce motion to change permanent custody of a minor child, Patrick Sheppard. The mother, Catherine S. Sheppard, is the plaintiff and appellant.

The maternal grandparents, Roy Sumner and Dorothy Sumner, to whom custody was granted, are the intervenors and appellees. The adoptive father, defendant Steven H. Sheppard, did not participate in the proceedings below and does not appear here. The controlling issue on appeal is the constitutionality of K.S.A. 1980 Supp.60-1610 (b)(2), a new paragraph added to the statute in 1980.

Catherine is the natural mother of Patrick Sheppard, born on January 14, 1970. Catherine and Steven were married in 1974, and Steven adopted Patrick. Catherine and Steven were divorced in 1977, and Catherine was awarded the legal custody of Patrick. Before and during the marriage, both Catherine and Patrick lived with Catherine's parents, Mr. and Mrs. Sumner, at Haysville. After the divorce, Patrick remained with the Sumners in order that he might continue to attend the

Haysville schools. Catherine, meanwhile, moved to Wichita.

K.S.A. 1980 Supp. 60-1610 (b)(2) became effective on May 17, 1980; Mr. and Mrs. Sumner filed a motion in the divorce case for change of custody one month later, June 18, 1980. The statute reads:

> "(2) At any time after custody of any minor child has been awarded pursuant to a divorce, annulment or separate maintenance decree, any person who has had actual physical custody of any such child after such decree was rendered with the parent having legal custody, where applicable, may request by motion to the court rendering such decree that legal custody of such child or children be awarded to such person. Notwithstanding the parental preference doctrine the court may award custody of any such child to such

person if the best interests of such child will be served thereby; and, if the court determines that a parental relationship has been established between such child or children and the moving party. No motion may be made pursuant to this subsection, unless the movant has had actual physical custody of the child or children within six (6) months from the date of the motion. In determining the best interest of the child, the court shall consider all relevant factors, including but not limited to the following: (A) The length of time that any such child has been under the actual care and control of any person other than a parent and the circumstances relating thereto; (B) the desires of the child's parents as to custody; (C) the desires of the child as to the child's custodian; (D)

> the interaction and interrelationship of the child with parents, siblings, and any other person who may significantly affect the child's best interests; (E) the child's adjustment to such child's home, school, and community; and (F) the mental and physical health and age of all individuals involved." [Emphasis supplied.]

The trial court, following a full evidentiary hearing on the grandparent's motion, found that Catherine is the natural mother of Patrick; that in the decree of divorce entered on August 17, 1977, Catherine was granted the custody of Patrick; that the intervenors, the Sumners, have had the actual physical custody of Patrick, with Catherine's consent, for a great period of time since the divorce; that the Sumners have developed a parental relationship with Patrick; that

Catherine is not an unfit parent; that it is in the best interest of Patrick to be placed in the custody of the Sumners; and that K.S.A. 1980 Supp. 60-1610 (b)(2) does not violate the due process or equal protection clauses of the United States Constitution. The court then placed Patrick in the permanent custody of his grandparents, the Sumners, and granted biweekly visitation to Catherine. She appeals, contending first that the statute violates the the due process clause and is therefore unconstitutional.

Throughout the years, Kansas courts have applied the parental fitness doctrine. The rule is succinctly stated in Christlieb v. Christlief, 179 Kan. 408, 409, 295 P.2d 658 (1956):

> "[A] parent who is able to care for his children and desires to do so, and who has not been found to be an unfit person to have their custody in an action or

> proceeding where that question is in issue, is entitled to the custody of his children as against grandparents or others who have no permanent or legal right to their custody, even though at the time the natural parent seeks their custody such grandparents or others are giving the children proper and suitable care and have acquired an attachment for them."

Many earlier cases which support the rule are there cited. Later cases stating and applying the rule are Trompeter v. Trompeter, 218 Kan. 535, 545 P.2d 297 (1975); In re Eden, 216 Kan. 784, 533 P.2d 1222 (1975); Herbst v. Herbst, 211 Kan. 163, 505 P.2d 294 (1973); Irwin v. Irwin, 211 Kan. 1, 505 P.2d 634 (1973); and McGuire v. McGuire, 190 Kan. 524, 376 P.2d 908 (1962).

K.S.A. 1980 Supp. 60-1610 (b)(2) abrogates the rule in certain limited circumstances.

It makes the best interests rule applicable between parents and third persons. The best interests rule has heretofore be applicable only in child custody disputes between the parents. See Parish v. Parish, 220 Kan. 131, 132, 551 P.2d 792 (1976), where we said:

> "In determining the right of custody of children between parents, the primary consideration is the best interest and welfare of the children, and all other issues are subordinate thereto."

And see also Hardenburger v. Hardenburger, 216 Kan. 322, 532 P.2d 1106 (1975).

Before we consider the specific challenge to the statute, we should state the basic principles which we must apply in determining the constitutionality of a statute. These principles were stated in City of Baxter Springs v. Bryant, 226 Kan. 383, Syl. PP 1-4, 598 P.2d

1051 (1979), as follows:

"The constitutionality of a statute is presumed, all doubts must be resolved in favor of its validity, and before the statute may be stricken down, it must clearly appear the statute violates the constitution."

"In determining constitutionality, it is the court's duty to uphold a statute under attack rather than defeat it and, if there is any reasonable way to construe the statute as constitutionality valid, that should be done."

"Statutes are not stricken down unless the infringement of the superior law is clear beyond substantial doubt."

"The propriety, wisdom, necessity and expedience of legislation are exclusively matters for legislative determination and courts will not invalidate laws, otherwise constitutional, because

> the members of the court do not consider the statute in the public interest of the state, since, necessarily, what the views of members of the court may be upon the subject are wholly immaterial and it is not the province nor the right of courts to determine the wisdom of legislation touching the public interest as that is a legislative function with which courts cannot interfere."

In State ex rel. Schneider v. Liggett, 223 Kan. 610, 614, 576 P.2d 221 (1978), we said that the test as to whether a statute comports with the due process clause is:

> "whether the legislative means selected had a real and substantial relation to the objective sought. The rule has been restated in terms of whether the regulation is reasonable in relation to is subject and is adopted in the interest of the community."

The statute here under consideration is a part of our divorce and alimony law, and relates to the care and custody of children of the marriage. The welfare of children is, of course, a matter of state concern. See State ex rel. O'Sullivan v. Heart Ministries, Inc., 227 Kan. 244, 253, 607 P.2d 1102 (1980), appeal dismissed ____U.S.____, and Lennon v. State, 193 Kan. 685, 396 P.2d 290 (1964).

Appellant contends that K.S.A. 1980 Supp. 60-1610 (b)(2) violates the due process clause because it destroys the parental preference doctrine and allows a third party to take custody of a minor child even though the natural parent is fit. That is the situation before us: the court found the mother fit, but granted custody of the child to the grandparents, finding that such custody would be in the best interests of the child.

The reason for the parental preference doctrine is well stated by Justice Dawson in In re Kailer, 123 Kan. 229, 230, 231, 255 Pac. 41 (1927):

> "[I]t is urged that the welfare and best interests of the children were the paramount issue. Under the law of the land the welfare and best interests of children are primarily the concern of their parents, and it is only then parents are unfit to have the custody, rearing and education of children, that the state as parens patriae, with its courts and judges, steps in to find fitting custodians in loco parentium.
>
> . . . .
>
> "Putting the matter in another way, it is quite correct to say that the welfare of children is always a matter of paramount concern, but the policy of the state proceeds on the theory that their

welfare can best be attained by leaving them in the custody of their parents and seeing to it that the parents' right thereto is not infringed upon or denied. This is the law of the land on this subject. And it never becomes a judicial question as to what is for the welfare and best interests of children until the exceptional case arises where the parents are dead, or where they are unfit to be intrusted with the custody and rearing of their children and have forfeited this right because of breach of parental duty, or where the right has been prejudiced by the discord of the parents themselves. There are enough of the latter sort of cases where the courts are compelled to interfere and take the custody of children from unfit parents, or to decide wheich of quarrel-

ing parents should have that custody -- cases which search the hearts and consciences of judges as no other judicial duty does or can do. And no court should construe its intrusive jurisdiction as extending to cases where parents have done nothing offensive to law, morals, or good conduct, which would forfeit their paramount natrual right of parenthood, which is to have the custody of their own children."

The language of Justice Dawson was quoted in In re Vallimont, 182 Kansas 334, 337, 321 P.2d 190 (1958). Syl. PP 1 and 3 in that case bear upon the issue at hand. They read:

"A parent who is able to care for his children and desires to do so, and who has not been found to be an unfit person to have their custody in an action or proceeding where that question is in

issue, is entitled to custody as against grandparents or others who have no permanent or legal rights to custody."

"Courts will not disturb the family relation nor take children from their parent merely because third persons seeking their custody may have larger means and are therefore able to give the children greater comforts, wider education and the promise of a larger inheritance."

The United States Supreme Court recently recognized the fundamental nature of the relationship between parent and child in two cases, both of which involve the rights of natural parents of illegitimate children: Stanley v. Illinois, 405 U.S. 645, 31 L.Ed.2d 551 92 S.Ct. 1208 (1972) and Quilloin v. Walcott, 434 U.S. 246, 255, 54 L.Ed. 2d 511, 98 S.Ct. 549, reh. denied 435 U.S. 918 (1978).

In the latter case the court said:

> "We have little doubt that the Due Process Clause would be offended '[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest.' "

In the light of those opinions, the Kansas Court of Appeals considered the matter of the rights of natural parents in the care of In re Lathrop, 2 Kan. App. 2d 90, 575 P.2d 894 (1978). In that case an unwed father sought to gain custody of his child as against third parties who sought to adopt. The Court of Appeals affirmed the trial court, ruling that the natural father has a paramount right to custody over non-parents. The court said at 92-96:

"The thrust of the appellants' argument on appeal appears to be that the natural parents, by entering an illicit relationship, waived their constitutional rights of due process and equal protection regarding custody of their child. The appellee counters that in the absence of a finding of unfitness, case law and the federal and state constitutions protect his paramount right to custody of his natural child. Disposition of the issue requires consideration of the parental preference rule in Kansas, and the recent United States Supreme Court decisions in Quilloin v. Walcott, 434 U.S. 246, 54 L.Ed.2d 511, 98 S.Ct. 549 (1977), and Stanley v. Illinois, 405 U.S. 645, 31 L.Ed.2d 551, 92 S. Ct. 1208 (1972).

"It is well established in Kansas by statute and case law that natural

parents are to be given preference as to custody of their children when such a contest occurs with a non-parent. Herbst v. Herbst, 211 Kan. 163, 505 P.2d 294; In re Armentrout, 207 Kan. 366, 485 P.2d 183; In re Marsolf, 200 Kan. 128, 434 P.2d 1010.

"However, there are several ways that a parent may be deprived of his parental rights on a permanent basis. First, K.S.A. 1777 Supp. 38-824 provides a method by which a child or children may be declared dependent and neglected and parental rights consequently severed. In re Nelson, 216 Kan. 271, 531 P.2d 48; In re Bachelor, 211 Kan. 879, 508 P.2d 862. Second, K.S.A. 60-1610(a) authorizes a trial court hearing a divorce or separate maintenance suit to terminate parental rights of either or both parents if the court finds that they are unfit. Finally,

K.S.A. 59-2103 provides that when adoption occurs the natural parent's rights in and to said child or children shall cease. There are other instances provided for parents to divest themselves of the rights to children, but the facts in this case do not necesitate their enumeration.

. . . .

"The United States Supreme Court clearly established in its landmark decision, Stanley v. Illinois, supra, that an unwed father does have parental rights in his children and that those rights are substantial. The court there stressed that the rights to conceive and raise one's own children are essential rights, and further stated, 'The private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a

powerful countervailing interest, protection.' Stanley, supra, p. 651. . . .

. . . .

"This court has carefully considered the most recent pronouncement of the United States Supreme Court regarding the rights of a putative father in Quilloin v. Walcott, supra. That case involved the petition of a stepfather, now married to the natural mother of the child, to adopt a twelve-year-old illegitmate child. The natural father of the bo sought to prevent the adoption, arguirg that under Stanley he was entitled to a fitness hearing before his parental right could be terminated. He had never had custody of the child and had assumed only minimal responsibilities for his welfare and support. Furthermore, he was not requesting that he be given custody of the child; he only wished to prevent the

adoption. The court stated, 'Stanley left unresolved the degree of protection a State must afford to the rights of an unwed father in a situation, such as that presented here, in which the countervailing interests are more substantial.' (p.248.) The court emphasized the strong state interest in having children reared in a family setting, and stressed that the adoption would confirm and stabilize an already existing family unit. Balancing this strong interest against the weak interest of the father in vetoing the adoption, the court found that under the facts of the case, the natural father's rights of due process had been adequately protected by a 'best interest of the child' hearing, which of course requires a lesser quantum of proof than does a fitness hearing. The natural father also advanced in equal protection

argument, asserting that his interests were indistinguishable from those of a divorced or separated father or a mother no longer living with her child. The court summarily dismissed this argument, stated, 'We think appellant's interests are readily distinguishable from those of a separated or divorced father, and accordingly believe that the State could permissively give appellant less vetc authority than it provides to a married father.' (p.256.) In support of this statement, the court pointed to the difference in the extent of commitment to the support and welfare of the child.

"It is clear that Quilloin does not abrogate the basic premises of the Stanley case; that is, that a putative father does in fact have parental rights in his child. The holding of the Quilloin case is actually quite narrow: the constitu-

tional rights of an unwed father who merely seeks to veto the adoption of his child, without seeking custody of the child, are adequately protected by something less than a fitness hearing, and under the facts of that case his rights were protected by a 'best interest of the child' hearing.

"Applying the case and statutory law discussed above to the facts of the case at hand, we hold that Leon Scott, Jr., has parental rights to the custody of his child and under those circumstances that those rights must be given preference and will prevail over those of the adoptive parents due to the parental preference rule. Stanley establishes his parental rights and Quilloin does nothing to diminish those rights in this situation, where he appeared and asserted his desire to have the custody

> of his daughter soon after her birth . . . . The trial court found that he was a fit parent; therefore his right to have custody of his child is clear."

It is clear under our decisions and those of the United States Supreme Court that a natural parent's right to the custody of his or her children is a fundamental right which may not be disturbed by the state or by third persons, absent a showing that the natural parent is unfit. As we noted in In re Cooper, No. 51276, decided this same date, a parent's right to the custody, care, and control of his or her child is a fundamental liberty right protected by the Fourteenth Amendment of the Constitution of the United States.

The statute under consideration takes away that right. Fitness of parent is no longer the criteria. If the trial court determines that the best interests of the child

will be served by placing it with third persons, the court may do so. The parent need not consent, and he or she may be perfectly fit, willing, and able to care for and raise the child. No exceptional circumstances need exist.

The exact objective of the legislature is not clear. The act provides an expeditious method of awarding custody, despite the existence of fit parents, to persons who have had temporary custody of the child with the consent of a divorced parent. It reaches only the children of divorced parents, not those of separated or unwed parents. The statute does not appear necessary in order to further the State's interest in the protection of children, for we have the juvenile code provisions to neglected children, and provisions in the civil code to provide for changes in custody and support, and for the removal of children from unfit parents. See K.S.A. 1980 Supp.

38-824, K.S.A. 1980 Supp. 38-1301 et seq., and K.S.A. 1980 Supp. 60-1610 (a) and (b)(1).

Catherine Sheppard appeared before the trial court opposing the motion of her parents and seeking to retain custody of her son. The trial court made a specific finding, upon conflicting evidence which we need not detail here, that Catherine Sheppard was not an unfit parent. Under the authorities cited above, she has a fundamental right, protected by the Due Process Clause of the Fourteenth Amendment, to the custody of her child, as opposed to all third parties. She cannot be denied that right for the sole reason that a court determines and concludes that someone other than a natural parent might do a better job of raising the child, thus furthering his "best interests."

We hasten to add that a parent's right to custody of a child is not absolute. The parent must not be "unfit," and the court hearing a custody matter must make that de-

termination. In the case of In re Vallimont, 182 Kan. 334, 340, 321 P.2d 190 (1958) we said:

> "While the standard of fitness required of parents is difficult to specify without being somewhat ambiguous, conduct which makes a parent unfit may be defined within limits. There is not statutory definition of the word 'unfit.' It therefore must be given its ordinary significance, having due regard to the context. In general, the word means unsuitable, incompetent, or not adapted for a particular use or service. As applied to the relation of rational parents to their child, the word usually although not necessarily imports something or moral delinquency. Parents who treat the child with cruelty or inhumanity, or keep the child in vicious or disreputable surroundings, are said to be unfit. Parents who abandon the child, or neglect or refuse, when able so to do, to provide

> proper or necessary support and education required by law, or other care necessary for the child's well being are said to be unfit. Violence of temper or inability or indisposition to control unparental traits of character or conduct, might constitute unfitness. So, also, incapacity to appreciate and perform the obligations resting upon parents might render them unfit, apart from other moral defects."

See also In re Armentrout, 207 Kan. 366, 371-72, 485 P.2d 183 (1971).

What we hold here is simply this: that a parent who is not found to be unfit, has a fundamental right, protected by the Due Process Clause of the United States Constitution, to the care, custody and control of his or her child, and that the right of such a parent to custody of the child cannot be taken away in favor of a third person, absent a finding of

unfitness on the part of the parent. We hold that K.S.A. 1980 Supp. 60-1610 (b)(2), which destroys that fundamental right, is violative of the Due Process Clause and therefore unconstitutional.

We should note that we have reviewed the amendments to that section of the statutes by the 1981 Legislature which are included in H.B. 2029, and find those amendments do not resolve the infirmity.

We need not resolve the other issues raised by appellant in view of our determination of the Due Process issue.

The judgment is reversed.

McFARLAND, J., dissenting: I do not view K.S.A. 1980 Supp. 60-1610 (b) (2) as constitutionally impermissible. In the vast majority of factual situations the parental preference doctrine is appropriate and should control. The statute in question merely provides a trial judge a discretionary alternative when certain conditions precedent are found to exist. Simply put: (1) When the trial court has acquired ongoing jurisdiction of a minor child through a divorce, annulment or separate maintenance action; and (2) when the parent receiving custody consents to another person having physical custody of the child; and (3) when a parental relationship has been established between the child and the third person--then and then only may the third person move for custody of the child in the original domestic relations action. In determining the motion the statute mandates that the court consider "all relevant factors, including but not limited

to the following: (A) The length of time that any such child has been under the actual care and control of any person other than a parent and the circumstances relating thereto; (B) the desires of the child's parents as to custody; (C) the desires of the child as to the child's custodian; (D) the interaction and interrelationship of the child with parents, siblings, and any other person who may significantly affect the child's best interests; (E) the child's adjustment to such child's home, school, and community; and (F) the mental and physical health and age of all individuals involved."

Unlike a juvenile court proceeding, the State is not attempting to take custody of a child. The proceeding authorized by K.S.A. 1980 Supp. 60-1610 is, of necessity, only one chapter in an ongoing domestic relations action. By virtue of its specialized conditions, relatively few custody changes could arise from it. However, it is a valuable

addition to a trial judge's meager alternatives in child custody disputes.

Nowhere in the majority opinion is there any reference to a child's rights. Does the majority believe that only a parent has any rights? If the parent granted custody of a child sees fit to place that child with another person under such circumstances that a new family unit is created, does the child have no rights at all in the continuance of the new family unit? Does the majority consider the child as only a chattel belonging to the parents, to be lent and returned upon demand?

As a former district court judge I can certainly recall instances where this statute would have been highly desirable. The parent having custody may leave a child with relatives for many years, then suddenly want it back in a fit of guilt or due to changed circumstances. The relatives may well be the only home the

the child has known and a strong family unit has been created. The trial court should have the discretion to preserve the family unit as it now exists--whether such discretion should be exercised is dependent upon all relevant factors and is subject to judicial review.

I believe K.S.A. 1980 Supp. 60-1610 (b) (2) does not fail the requisite test as enunciated by the majority in Syl. 1 as follows:

> "The test as to whether a statute comports with the due process clause is whether the legislative means selected has a real and substantial relation to the objective sought, or whether the regulation is reasonable in relation to its subject and is adopted in the interest of the community."

I would affirm.

APPENDIX B

IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
DOMESTIC DEPARTMENT

CATHERINE S. SHEPPARD Plaintiff,	)	
vs:	)	CASE NO. 77 D 2572
STEVEN H. SHEPPARD Defendant.	)	

PURSUANT TO CHAPTER 60 OF THE
KANSAS STATUTES ANNOTATED

JOURNAL ENTRY

NOW ON THIS 4th day of September, 1980, this matter comes on for hearing on the motion for change of custody filed by Roy C. Sumner and Dorothy Sumner, maternal grandparents of Patrick Sheppard. The plaintiff appears in person and by her attorney, Randall E. Fisher. The maternal grandparents appear in person and by their attorney, Arnold M. Mize. There are no other appearances.

WHEREUPON, the parties present their evidence and arguments to the Court and rest.

THEREUPON, the Court, having heard the evidence and arguments of counsel, having examined the files and pleadings herein,

having read and considered the child custody investigation report filed herein and being duly advised in the premises, finds:

1. That Catherine Sheppard is the natural mother of Patrick Sheppard and Roy C. Sumner and Dorothy Sumner are the natural maternal grandparents of Patrick Sheppard.

2. That the Plaintiff and Defendant were divorced on the 15th day of August, 1977.

3. That in said Decree of Divorce Plaintiff was granted the permanent care, custody and control of Patrick Sheppard

4. That the Sumners have had the actual physical custody for a great period of time since said Decree of Divorce, said physical custody being consented to shortly after the time said Decree of Divorce was entered.

5. That during the time said maternal grandparents have had the actual physical custody of Patrick Sheppard, they have developed and maintained a parental relationship with Patrick Sheppard.

6. That the Court finds that the Plaintiff is not an unfit parent; however, it would be in the best interest of Patrick Sheppard to be placed in the legal custody of the maternal grandparents, Roy C. Sumner and Dorothy Sumner.

7. That the amendments to K.S.A. 60-1610 in L-1980, Ch. 174 §2 are constitutional and Plaintiff's challenges regarding due process, equal protection, vagueness and other constitutional issues are without merit.

8. That Plaintiff's challenge regarding the application of the "fitness" test versus "best interest" test is without merit.

9. That Plaintiff's argument regarding the inapplicability of said amendments with respect to custody and consent given prior to the effective date of said amendments is without merit.

IT IS THEREFORE, BY THE COURT, CONSIDERED, ORDERED, ADJUDGED AND DECREED that the permanent care, custody and control of Patrick

Sheppard should be and hereby is placed with Roy C. Sumner and Dorothy Sumner until further order of the Court.

IT IS FURTHER, BY THE COURT, CONSIDERED, ORDERED, ADJUDGED AND DECREED that Patrick Sheppard should be and hereby is ordered to be taken by Roy C. Sumner and Dorothy Sumner to an appropriate professional or social agency for evaluation for emotional or developmental disturbances forthwith and provided with counseling thereafter, if needed.

IT IS FURTHER, BY THE COURT, CONSIDERED, ORDERED, ADJUDGED AND DECREED that the present child support of $160.00 per month continue to be paid by the Defendant to the Clerk of the District Court and the Clerk of the District Court pay said sum out as follows:

$135.00 to Catherine Sheppard

$ 25.00 to Roy C. Sumner and Dorothy Sumner

IT IS FURTHER, BY THE COURT, CONSIDERED, ORDERED, ADJUDGED AND DECREED that the Plaintiff

be allowed visitation of Patrick Sheppard as follows:

A. On the 2nd and 4th weekend of each and every month, commencing on Friday, 5:00 P.M. until Sunday, 5:00 P.M.

B. On holidays, except Plaintiff shall not have visitation on Christmas Day unless it falls on a Friday on which Plaintiff's regular visitation is scheduled and visitation shall commence as regularly scheduled.

C. On other occasions as agreed upon by the parties.

IT IS SO ORDERED.

Opposition

Office - Supreme Court, U.S.
FILED
JAN 4 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-718

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1981

ROY SUMNER and DOROTHY SUMNER,
Petitioners,
vs.

CATHERINE S. SHEPPARD,
Respondent.

RESPONSIVE BRIEF TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1981

ROY SUMNER and DOROTHY SUMNER,
Petitioners,
vs.

CATHERINE S. SHEPPARD,
Respondent.

RESPONSIVE BRIEF TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

Respondent Catherine S. Sheppard feels the question presented by the Petitioners lacks sufficient federal interest to warrant granting the Petition for Writ of Certiorari and prays the Court deny the same.

QUESTION PRESENTED

Whether the due process clauses of the United States and Kansas constitu-

tions are violated when a statute allows a child to be taken from the custody of a "fit" parent solely because it is thought to be in the child's "best interest" to be placed elsewhere?

PARTIES TO THE PROCEEDING

Petitioners: Roy Sumner and Dorothy Sumner are the maternal grandparents of Patrick Sheppard, a minor child.

Respondent: Catherine S. Sheppard is the natural mother of Patrick Sheppard, a minor child.

OPINION BELOW

The opinion of the Kansas Supreme Court is reported as Sheppard v. Sheppard, 230 Kan. 146, 630 P.2d 1121 (1981.)

JURISDICTION

Petitioners attempt to invoke jurisdiction pursuant to 28 U.S.C. §1257 (3).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution
Amendment Five

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in the time of War or public danger nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, **nor be deprived of life, liberty, or property, without due process of law;** nor shall private property be taken for public use, without just compensation. (emphasis added)

United States Constitution
Amendment Fourteen

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; **nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.** (emphasis added)

Kansas Constitution
Bill of Rights

Section 18. All persons, for injuries suffered in person, reputation or

property, **shall have remedy by due course of law,** and justice administered without delay. (emphasis added)

STATUTES INVOLVED

K.S.A. 1980 Supp. 60-1610 (b) (2)

At any time after custody of any minor child has been awarded pursuant to a divorce, annulment or separate maintenance decree, any person who has had actual physical custody of any such child after such decree was rendered with the consent of the parent having legal custody, where applicable, may request by motion to the court rendering such decree that legal custody of such child or children be awarded to such person. **Notwithstanding the parental preference doctrine** the court may award custody of any such child to such person if the **best interests of such child** will be served thereby; and, if the court determines that a parental relationship has been established between such child or children and the moving party. No motion may be made pursuant to this subsection, unless movant has had actual physical custody of the child or children within six months from the date of the motion. In determining the **best interest of the child,** the court shall consider all relevant factors, including but not limited to the following: (A) The length of time that any such child has been under the actual care and control of any person other than a parent and the circumstances relating thereto; (B) the desires of the child's parents as to custody; (C) the desires of the child as to the child's custodian; (D) the interaction and interrelationship of the child with parents, siblings, and any other person who may significantly affect the child's

best interests; (E) the child's adjustment to such child's home, school, and community; and (F) the mental and physical health and age of all the individuals involved." (emphasis added)

STATEMENT OF THE CASE

For purposes of deciding the Petition for Writ of Certiorari, Respondent concurs in the Petitioners' Statement of the Case; however, would add that the trial court specifically found that the Respondent was a fit and proper person to have custody of her son.

ARGUMENTS AND AUTHORITIES

THE DECISION OF THE KANSAS SUPREME COURT IS NOT IN CONFLICT WITH THE DECISIONS OF SISTER STATES OR THE APPLICABLE PROVISIONS OF THE UNITED STATES CONSTITUTION.

Respondent feels there is no valid reason for this Court to grant Petitioners' Petition for Writ of Certiorari. The decision of the Kansas Supreme Court was grounded on the due process clauses of the Kansas and United States constitutions. First, the fact the decision was

grounded upon the due process clause of the Kansas Constitution takes this matter beyond the review of this Court. Second, based upon the same facts, the decisions of sister states are of no consequence to this case, as they have no application to the Kansas Constitution or the manner in which it is interpreted by the Kansas Supreme Court. Third, the decision of the Kansas Supreme Court, in its reliance on the United States Constitution, is consistent with federal caselaw on the subject. Finally, the decisions of the sister states relied on by Petitioners all predate the Stanley v. Illinois line of cases and are of dubious value for the proposition there is a conflict of decisions among the states.

Historically, the United States Supreme Court has recognized that few rights are as important as the right of family integrity. The Court has recog-

nized that the right to marry (Loving v. Virginia, 388 U.S. 1, 18 L. Ed.2d 1010, 87 S.Ct. 1817 [1966.]; Skinner v. Oklahoma, 316 U.S. 535, 86 L. Ed. 1655, 62 S.Ct. 1110 [1942]) and to raise a family are the basic civil rights of all persons. (Meyer v. Nebraska, 262 U.S. 390, 67 L. Ed. 1042, 43 S.Ct. 625 [1923].) These rights have been acknowledged to be rights "far more precious . . . than property rights." (May v. Anderson, 345 U.S. 528, 97 L. Ed. 1221, 73 S.Ct. 840 [1977].) In Meyer v. Nebraska, supra, at 399, this Court stated that:

> "While this Court has not attempted to define with exactness the liberty . . . guaranteed [by the Fourteenth Amendment], the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire

> useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men."

In Prince v. Massachusetts, 321 U.S. 158, 166, 88 L. Ed. 645, 64 S.Ct. 438 (1944), it was stated:

> ". . . It is cardinal with us that the custody, care and nurture of the child rests first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. . . ."

See, also, Moore v. City of East Cleveland, 431 U.S. 494, 52 L. Ed.2d 531, 97 S.Ct. 1932 (1977); Cleveland Board of Education v. La Fleur, 414 U.S. 632, 39 L. Ed.2d 52, 94 S.Ct. 791 (1974); Wisconsin v. Yoder, 406 U.S. 205, 32 L. Ed.2d 52, 92 S.Ct. 1526 (1972); Eisenstadt v. Baird, 405 U.S. 438, 31 L. Ed.2d 349, 92 S.Ct. 1029 (1972); Pierce v. Society of

Sisters, 268 U.S. 510, 69 L. Ed. 1070, 45 S.Ct. 571 (1925).

In Stanley v. Illinois, 405 U.S. 645, 31 L. Ed.2d 551, 92 S.Ct. 1208 (1972), the cases on the issue were summarized:

> "The private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection. It is plain that the interest of a parent in the companionship, care, custody and management of his or her children 'come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.' Kovacs v. Cooper, 336 U.S. 77, 95, 93 L. Ed. 513, 527, 69 S. Ct. 448, 10 ALR 2d 608 (1949) (Frankfurter, J., concurring)."

The cases mandate that courts closely scrutinize any intrusion into the family unit and jealously guard rights of the family members when the state or a third party attempts to dismember the

unit. (Davis v. Page, 618 F.2d 374 [5th Cir. 1980]; Kyees v. County Dept. of Public Welfare, 600 F.2d 693 [7th Cir. 1977]; Duchesne v. Sugarman, 566 F.2d 817 [2nd Cir. 1977]; Drummond v. Fulton Cty. Dept. of F. & Child. Serv., 547 F.2d 835 [5th Cir. 1977]; Brown v. Guy, 476 F. Supp. 771 [D. Nev. 1979]; Roe v. Conn, 417 F. Supp. 769 [M.D. Ala. 1976].) In Davis v. Page, supra, at 379, the court noted:

> ". . . [T]hat a parent's interest in the custody of his or her child is among the most basic and fundamental of the liberties protected by the Constitution. Loss of a child is one of the severest possible sanctions that can be taken against a parent; it is a deprivation which can be equated with imposition of a fine or imprisonment through criminal proceedings. Indeed it is not unlikely that many parents would choose to serve a prison sentence rather than to lose the companionship and custody of their children. . . ." (emphasis added)

Kansas caselaw has generally followed federal caselaw regarding the fundamental integrity of the family unit and the effect that it has upon due process and equal protection arguments. See, State, ex rel. Schneider v. Liggett, 223 Kan. 610, 576 P.2d 221 (1978). Thereafter, the Kansas Supreme Court recognized the right to family integrity is fundamental when a non-parent or the state is seeking to remove a child temporarily or permanently from a parent. See, Beebe v. Chavez, 226 Kan. 591, 597, 602 P.2d 1279 (1979).

1. Federal law recognizes that "fit" parents are entitled to custody of their children.

Federal cases previously cited all recognize the sanctity of the family unit. It wasn't until the case of Stanley v. Illinois, supra, however, that it became clear what federal constitu-

tional protections applied to parental custody. In Stanley the father of an illegitimate child challenged an Illinois statute which presumptively declared him to be unfit to assume custody of his child upon the death of the child's mother. In striking down the statute as violative of the due process clause, the Court stated that:

> ". . . **We conclude that, as a matter of law, Stanley was entitled to a hearing on his fitness as a parent before his children were taken from him** and that, by denying him a hearing and extending it to all other parents who custody of their children is challenged, the State denied Stanley the equal protection of the laws guaranteed by the Fourteenth Amendment."
>
> . . . . . .
>
> ". . . What is the state interest in separating the children from fathers without a hearing designed to determine whether the father is unfit in a particular disputed case? **We observe that the State registers no gain toward its declared goals when it separates child-**

> **ren from the custody of fit parents.** Indeed, if Stanley is a fit father, the State spites its own articulated goals when it needlessly separates him from his family."
>
> . . . . . .
>
> **". . . The State's interest in caring for Stanley's children is de minimis if Stanley is shown to be a fit father.** It insists on presuming rather than proving Stanley's unfitness solely because it is more convenient to presume than to prove. . . ." (pp. 649, 652-653, 657-658.) (emphasis added)

Subsequent to Stanley, the case of Smith v. Organization of Foster Families, 431 U.S. 816, 53 L. Ed.2d 14, 97 S.Ct. 2094 (1977) was decided. There individual foster parents and an organization of foster parents sued the State of New York alleging they were entitled to a due process hearing before their foster children were removed from their homes. While the Court did acknowledge foster parents were entitled to some sort of due process hearing before removal, it indicated that

foster parents are not legally equal to natural parents and, therefore, not entitled to the same degree of due process. Significantly, the Court further stated that whatever due process a foster parent was due paled at the instant its rights came into conflict with those of a natural parent. Although it was not an issue in that case, the statements in Smith clearly demonstrate that the right of a natural parent is far superior to that of third parties and entitled to greater protection and recognition in custody cases against third parties.

Shortly after Smith was handed down, this Court decided the case of Quilloin v. Walcott, 434 U.S. 246, 54 L. Ed.2d 511, 98 S.Ct. 549, reh. denied 435 U.S. 918, 55 L. Ed.2d 511, 98 S.Ct. 1477 (1978). There the father of an illegitimate child attempted to block the adoption of his child by the husband of the

child's mother. Georgia law required consent of both parents of a legitimized child; however, only the mother's consent was required to effectuate adoption of an illegitimate child. The Court upheld the statute even though it made a distinction between fathers of legitimate and illegitimate children. In doing so the Court noted that here the father never asserted any parental rights prior to the attempted adoption, nor did he attempt to gain custody when he filed his objection. The Court did note, however, that:

> **"We have little doubt that the Due Process Clause would be offended '[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest.' . . ."** (p. 520.) (emphasis added)

Any question regarding the rule set forth in Quilloin was cleared up in the recent case of Caban v. Mohammed, 441 U.S. 380, 60 L. Ed.2d 297, 99 S.Ct. 1760

(1979). There the Court ruled that even a father of an illegitimate child may block the adoption of the illegitimate child by withholding consent. In its holding the Court declared that a putative father was entitled to the same rights as any other father of a child.

2. Kansas law recognizes that "fit" parents are entitled to custody of their children.

The sanctity of the family unit has a long history in Kansas. This has led Kansas courts to develop the "parental preference doctrine". When there is a child custody contest between a parent and third party, a parent who has not been found to be an unfit person to have custody in a proceeding where that question is in issue, is entitled to custody as against a third party or others who have no permanent or legal right to custody. (In re Armentrout, 207 Kan. 366, 485 P.2d 183 [1971]; Finney v. Finney, 201 Kan. 263, 440 P.2d 608 [1968]; In re

Stafford, 193 Kan. 120, 392 P.2d 140 [1964]; Jennings v. Jennings, 174 Kan. 305, 255 P.2d 618 [1953]; Decker v. Decker, 171 Kan. 380, 233 P.2d 527 [1951].)

Respondent's research indicates that the doctrine initially developed in Kansas one hundred years ago and has continued undaunted to this day.

The first case to acknowledge the right of a parent to custody of its child was Chapsky v. Wood, 26 Kan. 650, 40 Am. Rep. 321 (1881). There a father sought to get custody of his child from his sister-in-law. Although he was not successful in that endeavor, the Kansas Supreme Court acknowledged that a father is prima facie entitled to the custody of his minor child because the law of nature recognizes that the affection between parent and child is "stronger and more

potent than any which springs from any other human relation". (Id., at 652.) The Court further noted that such a bond should be given more consideration than someone who may be able to offer wealth or social position. Later, in the case of In re King, 66 Kan. 695, 72 Pac. 263 (1903), the court heard an original habeas corpus proceeding brought by the paternal grandmother to take custody of two minor children from their natural mother. In denying the petition, the court stated that

> ". . . The parents have ordinarily a legal right, to the custody of their children. It is not an absolute and unqualified right, but it is a real right, with which a court may interfere only upon a showing of exceptional circumstances. . . ."
>
> . . . . . .
>
> ". . . It is too clear for argument that in the case of children of such tender years, having regard alone to their own welfare, leaving all other

> matters out of consideration, their proper place is with their mother, **unless it be found that she is unfit for the trust or incapable of caring for them,** and the evidence in this case does not warrant such a finding." (pp. 699, 701.) (emphasis added)

In Buchanan v. Buchanan, 93 Kan. 613, 144 Pac. 840 (1914), the court was faced with a situation similar to the case at bar. There the parents had two children before they divorced. Later a relative of the father took physical custody of the children by intervening in the divorce action. The Kansas Supreme Court affirmed the right of a fit parent to have custody of its child over a third party who is better able to provide for the child.

Shortly after Buchanan, the Kansas Supreme Court decided In re Zeigler, Petitioner, 103 Kan. 901, 176 Pac. 974 (1918). There the mother of a child died, forcing the father to place the child with its grandmother for care. Subsequently, the father set up a new

household and sought custody of his daughter. The district court found the father fit to take care of the child but decided it would be in the child's best interest to remain with her grandmother. In reversing the district court and granting the father custody, the court stated:

> ". . . [A] parent cannot be deprived of his child because others love her and are fitted to care for her. (Swarens v. Swarens, 78 Kan. 682, 97 Pac. 968; Pinney v. Sulzen, 91 Kan. 407, 137 Pac. 987.) The fact that the respondents may give her attentions and comforts that the father cannot does not warrant a court in breaking the family relation. Ordinarily the love of a parent is more advantageous to the child than any creature comforts or other advantages that a stranger may offer. Here there is not only the parental relation, but the father, who manifests affection for and interest in his daughter, and who is found not to be unfit to have her care and custody and seems to be better able to provide for her comfort and education than are the respondents. It is true it is

> contended that the welfare of the child is the prime consideration, but courts cannot overlook the rights of a parent or the ties which exist between parent and child in determining the child's welfare." (p. 903.) (emphasis added)

In Denton v. James, 107 Kan. 729, 193 Pac. 307 (1920), the court began recognizing the constitutional dimension of the parental preference doctrine. There it was said:

> "Man has no higher right or interest or happiness than that for which the words family and home stand. Very often it is said, with a touch of derision, that a child is not a chattel, and a parent has no property in his child giving him right to custody--which is very true. **The interest which a parent has in the nurture of his own offspring, and in nearness to them for that purpose, lies in a different plane from that occupied by property; it transcends property. On the child's side, it has no higher welfare than to be reared by its parents.** The state has no higher welfare than to have children reared by their parents, and free government is instituted for the protection and benefit of parenthood as one of the natural rights which

> the citizen possesses. Acting on these principles, this court holds that welfare of a child is best subserved by leaving it with its natural guardian until it is demonstrated that the parent is unfit to discharge the duties which are correlative to his right. Then, and not until then, does his right yield. . ." (p. 735.) (emphasis added)

Major recognition of the "parental preference doctrine" came in the case of In re Kailer, 123 Kan. 229, 255 Pac. 41 (1927). There a father brought a habeas corpus proceeding against his brother and sister-in-law to gain custody of his two minor children. The children were entrusted to the respondents when the children were eleven days old because of the death of their mother. At that time, petitioner was financially unable to take care of the children. Later, petitioner sought to regain custody of his children. In the meantime he had remarried and his financial situation had improved greatly. During the time the children

were in respondents' care, petitioner contributed toward their support and maintained contact with them. A dispute devloped over custody. After the district court awarded custody to petitioner, respondents appealed. In affirming the lower court's decision, the court described the constitutional nature of the "parental preference doctrine":

> "Putting the matter in another way, it is quite correct to say that the welfare of children is always of paramount concern, but the policy of the state proceeds on the theory that their welfare can best be attained by leaving them in the custody of their parents and seeing to it that the parents' right thereto is not infringed upon or denied. **This is the law of the land on this subject. And it never becomes a judicial question as to what is for the welfare and best interests of children until the exceptional case arises where the parents are dead, or where they are unfit to be intrusted with the custody and rearing of children and have forfeited this right because of breach of parental duty, or where the right has been prejudiced by the discord**

> **of the parent's themselves.** There are enough of the latter sort of cases where the courts are compelled to interfere and take the custody of children from unfit parents, or to decide which of quarreling parents should have that custody--cases which search the hearts and consciences of judges as no other judicial duty does or can do. And **no court should construe its intrusive jurisdiction as extending to cases where parents have done nothing offensive to law, morals, or good conduct, which would forfeit their paramount natural right of parenthood, which is to have the custody of their own children."** (p. 231.) (emphasis added)

The case of Stout v. Stout, 166 Kan. 459, 201 P.2d 637 (1949), is a landmark case involving the parental preference doctrine. There a father attempted to gain custody of his two minor children after they had been placed in their maternal grandparents' home by their mother after she received legal custody of them. The sole issue at hearing was whether the children should live with the father or the maternal grandparents. At

trial the evidence demonstrated that the father was fit; however, the trial court concluded it would be in the children's best interest for them to live with the grandparents. The court reaffirmed In re Kailer, supra, and noted that

> ". . . Under our recent and often repeated decisions, to which we have strictly adhered for many years, **the established and inviolate rule has been and now is that a parent who is able to care for his children and desires to do so, and who has not been found to be an unfit person to have their custody, in an action or proceeding where that question is in issue, is entitlted to custody of his children as against grandparents or others who have no permanent or legal right to their custody,** even though at the time the natural parent seeks their custody such grandparents or others are giving the children proper and suitable care and have acquired an attachment for them (See, Jones v. Jones, 155 Kan. 213, 219, 124 P.2d 457; May v. May, 162 Kan. 425, 176 P.2d 533; In re Jackson, 164 Kan. 391, 190 P.2d 426; Bailey v. Bailey, 164 Kan. 653, 192 P.2d 190, citing numerous other and early decisions to the same effect)."

> "We frankly concede that on rare occasions the rule just stated leads to consequences which sometimes appear to be harsh and do not correspond with our sympathies under the exigencies of a given case. Even so we are convinced that to change it would lead to more frequent results of that character. Be that as it may, **the doctrine is now too firmly entrenched in the settled law of this state to permit its repudiation** and we are constrained to adhere to it." (pp. 463-464.) (emphasis added)

In addition, the Court stated that any language existing in any previous decisions "justifying the construction that the children of a natural parent may be given to third persons without a finding such parent is an unfit person to have their custody it should be and is hereby disapproved." Id., at 265.

Numerous other cases have followed the parental prefernce doctrine and prevented third parties from taking children from natural parents because it had not been shown the parent was unfit. See,

e.g., In re Eden, 216 Kan. 784, 533 P.2d 1222 (1975); Irwin v. Irwin, 211 Kan. 1, 505 P.2d 634 (1973); In re Rhea, 207 Kan. 611, 485 P.2d 1382 (1971); Hamm v. Hamm, 207 Kan. 431, 485 P.2d 221 (1971); McGuire v. McGuire, 190 Kan. 524, 376 P.2d 908 (1962); Heilman v. Heilman, 181 Kan. 467, 312 P.2d 622 (1957); Leach v. Leach, 180 Kan. 545, 306 P.2d 193 (1957); Christlieb v. Christlieb, 179 Kan. 408, 295 P.2d 658 (1956).

3. Caselaw of sister states recognize that "fit" parents are entitled to custody of their children.

Numerous states have held that parents are entitled to custody of their child absent a showing of unfitness or some other equally compelling reason. A case of particular significance is the California case of In re B.G., 11 Cal. 3d 679, 523 P.2d 244, 114 Cal. Rptr. 444 (1974). In that case the California Su-

preme Court examined a child custody statute similar to the one under attack here; however, the California law allowed a court to award custody to a third party only after finding an award of custody to the parent could be detrimental to the child and then it must be in the best interest of the child to award it to the nonparent seeking custody. On appeal the court held that to make an award based solely on a child's best interest was improper as it did not recognize or protect the natural rights of parents to custody of their children.

Other states which have found the "unfitness" requirement in a custody dispute between a parent and third party are:

Georgia: Drummond v. Fulton County, Etc., 237 Ga. 449, 228 S.E.2d 839 (1976).

Illinois: In re Adoption of Burton, 43 Ill. App. 3d 294, 1 Ill.

Dec. 946, 356 N.E.2d 1279 (1976).

Kentucky: Freeman v. Freeman, 547 S.W.2d 437 (Ky. 1977).

Maryland: Montgomery Cty. Dept. of Soc. Serv. v. Sanders, 38 Md. App. 406, 381 A.2d 1154 (1977).

Massachusetts: Custody of Minor, ____ Mass. ____, 389 N.E.2d 68 (1979).

Montana: Matter of Guardianship of Dovey, 174 Mont. 283, 570 P.2d 575 (1977).

Texas: Sanchez v. Texas Dept. of Human Resources, 581 S.W.2d 260 (Tex. Civ. App. 1979).

Vermont: In re N.H., 373 A.2d 851 (Vt. 1977).

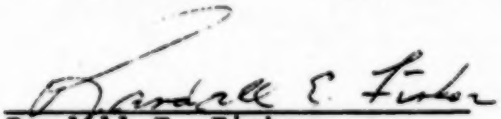
West Virginia: Hammack v. Wise, 211 S.E.2d 118 (W.Vir. 1975).

The State of New York holds that a parent is entitled to custody of its child as against the state or a third party absent a showing of unfitness or some other like extraordinary circumstances. (Raysor v. Gabbey, 57 A.D.2d 437, 395 N.Y.S.2d 290 [1977]; Bennett v. Jeffreys, 40 N.Y.2d 543, 356 N.E.2d 277, 387 N.Y.S.2d 821 [1976].)

CONCLUSION

For these reasons, and because there is no conflict between sister states which has any bearing on this case, a writ of certiorari to review the decision of the Kansas Supreme Court should be denied.

Respectfully submitted,



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